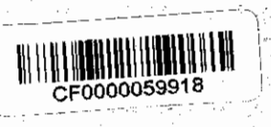
MA 1124/98

XII-189 / (Jail)
C. J. P. R. 11/94/2,000



High Court of Madhya Pradesh
JABALPUR.
- 4 MAY 1998
Reg. No. 42
Recept Clerk
High Court, Jabalpur

APPEAL OF PRISONER

No. 7346 Name मुखबा उर्फ मालिकराम

Father's name भुनू राम सतनामी निवासी ग्राम - टाडा थाना - धारकीवा

Residence जिला - रायपुर (म०प्र०) Age २४ वर्ष

Sentenced to आजीवन कारावास रु. 500/- On 28/2/98
या 3 माह कठिन

Under section 302 भा०दं०वि०. by मान० पंचम अपर सत्र न्यायालय रायपुर (म०प्र०)

It is explained to the prisoner that if he states or wishes to be represented by legal practitioner the Appellate Court will not proceed with the base for seven days unless the legal practitioner appears. If the legal practitioner does not appear within seven days he may not heard at all. If the prisoner states that he does not wish to be represented by legal practitioner the court may proceed at once with the case and will not be obliged to give a hearing to any legal practitioner who should appear.

1 Date of Application for copy of Judgement .....

2 Date on which copy received 22/4/98

3 Date on which Appeal sent 27/4/98

4 Whether the prisoner wishes to be represented or not – Yes / No

No. 7346 Name मुखबा उर्फ मालिकराम S/o भुनूराम

Confined in केन्द्रीय Jail रायपुर (म०प्र०)

No. 125/विधि/98 Dated 22/4/1998

Forwarded to the ~~CHIEF JUDICIAL MAGISTRATE~~ मान० अति० पँजीयक महोदय मान० उच्च न्याया० म०प्र० जबलपुर

together which a copy of judgement or order passed in the case for favour of transmission to the proper Appellate Court.

संलग्न :- S.T. No 168/97 की सत्यप्रतिलिपि।

Superintendent
Superintendent,
Central Jail, Raipur (M.P.)

Date of receipt in ..... office .....

Date of receipt record to accompany the 28.2.98 & 27.4.98

Memo of Appeal to the Appellate court Feb March 31 April 27

No ..... Dated ..... 199.....

Forwarded to the ..... 58 within time

.....

Date of receipt in Appellate Court .....

(P. T. O.)

(5) (34)

HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

Criminal Appeal No.1124 of 1998

Bhukhau @ Malikram

- Versus -

State of Madhya Pradesh (now Chhattisgarh)

JUDGMENT FOR CONSIDERATION

Sd/-
L.C. Bhadoo
Judge

HON'BLE MR. JUSTICE D.R. DESHMUKH

I agree.

Sd/-
Dilip Raosaheb
Deshmukh
Judge

POST FOR JUDGMENT ON 2ND SEPTEMBER, 2005

Sd/-
L.C.BHADOO
Judge

(35)

HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

Criminal Appeal No.1124 of 1998

Bhukhau @ Malikram

- Versus -

State of Madhya Pradesh (now Chhattisgarh)

Present: -

Mr. Abhay Tiwari, Advocate: For the appellant.

Mr. J.D. Bajpayee, Govt. Advocate: For the State/respondent.

DIVISION BENCH: -

HON'BLE MR. L.C. BHADOO AND

HON'BLE MR. D.R. DESHMUKH, JJ.

JUDGMENT

(Delivered on 2ND September, 2005)

As per *L.C. Bhadoo, J*: -

1. By this appeal, the accused/appellant has questioned the legality of judgment of conviction and sentence dated 28th February, 1998, passed by the 5th Additional Sessions Judge, Raipur in Sessions Trial No.168/97, whereby learned Additional Sessions Judge after holding the accused/appellant guilty for commission of offence under Section 302 of the Indian Penal Code for committing the murder of his wife namely Sukhwantin Bai, sentenced him to undergo imprisonment for life and to pay fine of Rs.500/-, in default of payment of fine to further undergo R.I. for three months.

2. The prosecution case necessary for the disposal of this criminal appeal is that on 17.2.1997 at about 6.10 p.m. Dr. S.B. Magloorkar (PW-20) vide Ex.P-24 intimated the

Station House Officer, Police Station Dharsiva that Sukhwantin Bai wife of Bhukhau @ Malikram has been brought to the Primary Health Centre, Dharsiva with intensive burn injuries all over the upper part of body, however she is conscious and talking. On receiving this information Head Constable Shri Laxmi Prasad Dubey (PW-16) reached to the Primary Health Centre, recorded the Dehati Nalishi (Ex.P-11) by recording the statement of Sukhwantin Bai and based on this recorded a merg intimation (Ex.P-17). He also recorded the dying declaration of Sukhwantin Bai (Ex.P-12) in which she had stated that she was married to Malikram about 9 to10 years back and there is one female child of five years age out of the wedlock. She had further stated that on Saturday night her husband went to watch the Kabaddi game and when he returned she asked her husband as to why had he gone without telling her, on this the accused/appellant replied that she is doubting his character and started beating her, thereafter poured kerosene oil on her body and set her on fire with the match-box. Based on that F.I.R. (Ex.P-16) was registered for commission of offence under Section 307 of the I.P.C. and Sukwantin Bai was sent to Medical Hospital, Raipur for further treatment where she died on 25.2.1997, intimation of which was sent by Dr. S.K. Mandavi to the Police Station Dharsiva on the same day. On receiving this intimation, the offence was converted under Section 302 of the IPC.

3. During investigation a plastic container from which the kerosene oil was poured on the deceased Sukhwantin Bai, one half-burnt blouse of blue colour, one half-burnt Sari and one half-burnt Peticoat of Sukhwantin Bai were taken into possession by the Investigating Officer. Ms. Yamini Pandey (PW-19) Naib Tehsildar cum Executive Magistrate, Raipur also recorded the second dying declaration of deceased Sukhwantin Bai on 19.2.1997 in which also she corroborated her earlier dying declaration. Dr. Arvind

Nerlawar conducted the post mortem on the body of deceased and the post-mortem report is Ex.P-27. As per doctor's opinion deceased Sukhwantin Bai's burn injuries were up to 60%, she was serious, smell of kerosene oil was emanating from the body and she died because of Syncope due to burn injuries. The Investigating Officer also got prepared the site plan (Ex.P-6). After completion of investigation, charge sheet was filed in the Court of Judicial Magistrate First Class, Raipur, who committed the case for trial to the Sessions Judge, Raipur from where learned 5th Additional Sessions Judge, Raipur received the case on transfer for trial. Learned Additional Sessions Judge after hearing counsel for the parties and perusing the records framed the charge against the accused/appellant for commission of offence under Section 302 the I.P.C. However, the accused/appellant abjured his guilt.

4. The prosecution in order to prove the above offence against the accused/appellant examined in all 22 witnesses and thereafter, learned 5th Additional Sessions Judge recorded the statement of accused/appellant under Section 313 of the Cr.P.C. in which the accused/appellant denied the prosecution evidence and stated that relations between him and his wife were not strained, they never quarreled with each other and on the date of incident he was out of the house, as he went to do the work, on his returning he came to know that his wife has been sent for treatment to Medical Hospital, Raipur, he immediately went there but he could not talk to his wife because he was arrested by the police. He also produced two witnesses in his defence namely Pulluram (DW-1) and Gopal (DW-2). Learned Additional Sessions Judge after hearing Additional Public Prosecutor and counsel for the accused convicted and sentenced the accused in the aforesaid manner.

5. We have heard Mr. Abhay Tiwari, learned counsel for the accused/appellant and Mr. J.D. Bajpayee, learned Govt. Advocate for the respondent/State.

6. While assailing the judgment of trial Court learned counsel for the accused/appellant argued that whole case rests on the extra-judicial confession of deceased Sukhwantin Bai, who in her dying declaration has categorically stated that her husband tried to save her, therefore, from the above evidence of deceased Sukhwantin Bai it is clear that the accused/appellant tried to save her wife, as such, it cannot be believed that the accused/appellant set his wife on fire. The second ground raised by learned counsel for the accused/appellant is that from the record the prosecution has not been able to establish that accused/appellant has set his wife on fire with an intention to commit her murder, therefore, offence does not travel beyond Section 304 Part II of the IPC. In support of his argument, he relied upon the decision of Hon'ble Apex Court in the matter of **Hari Shankar V. State of Rajasthan** reported in **1999 Cri.L.J. 2902**.

7. On the other hand, learned Government Advocate supported the judgment of trial Court.

8. Having heard learned counsel for the parties, we have carefully scanned the prosecution evidence, dying declaration and other material available on record. There is no ocular evidence in this case which rests solely on circumstantial evidence i.e. dying declaration of the deceased and medical evidence. In order to fasten the accused in a criminal case based on the circumstantial evidence the settled principle of law is that "*in a case based on circumstantial evidence, before the Court can record conviction, it must satisfy itself that circumstances from which an inference of guilt could be drawn have been established by unimpeachable evidence led by the prosecution and that all the circumstances put together are*

not only of a conclusive nature but also complete the chain so fully as to unerringly point to the guilt of accused and are not capable of any explanation which is not consistent with the hypothesis of the guilt of the accused."

9. Now we shall proceed to examine the facts and evidence available on record in the present case on the basis of above settled principle. It is admitted position that whole case rest on the dying declaration made by deceased Sukhwantin Bai and in order to base conviction on a dying declaration the Court, before placing reliance on the dying declaration, has to satisfy that the dying declaration made by the deceased was voluntary, true and un-influenced by any person for making a false dying declaration and that the deceased was fit to give statement when recorded. The mental condition of the maker of the declaration, alertness of mind, memory and understanding of what she is saying are matters which can be observed by any person and for that purpose a certificate of a medically trained person is insisted upon. Where dying declaration is found to be coherent, consistent and free from any effort to influence the deceased, and made in fit mental state disclosing the name of the person who is responsible for the crime, conviction can be based on such dying declaration and even no corroboration is required where the statement made by the deceased is found to be voluntary, without tutoring or concoction and there was no inconsistency in the various declarations of the deceased as to the cause of death, dying declaration can be the sole basis of conviction.

10. In the light of above principle, if we look into the evidence adduced in the present case, Laxmi Prasad Dubey (PW-16) has stated in his evidence that on 17.2.1997 he was working as Head Constable at Police Station Dharsiva, on receiving information from the Primary Health Centre, Dharsiva, he reached there and recorded the Dehati Nalishi (Ex.P-11) which bears his signature at place 'A to A' and thumb impression of

Sukhwantin Bai at place 'B to B'. As Sukhwantin Bai's condition was serious and considering that there is every likelihood that she may die he recorded the dying declaration (Ex.P-12) in presence of doctor. In the cross-examination he has stated that five persons were standing nearby Sukhwantin Bai i.e. Dr. Sanjeev Magloorkar, Bhuvanlal Sahu, Ashwani Kumar, husband of deceased and Kamini Bai-mother of deceased. In the cross-examination of this witness, the defence has not been able to elicit any thing that makes the dying declaration of deceased unreliable. Perusal of Dehati Nalishi, which was recorded by the Head Constable Laxmi Prasad Dubey, shows that Sukhwantin Bai was fit to give evidence and she has stated that she was married to present accused/appellant ten years before the date of incident, she has got a five years old female child, her husband is working on a truck and was keeping relations with other ladies also. In the Saturday night her husband did not return home and when he returned she tried to enquire from her husband that where he was, then her husband replied that he had gone to watch Kabaddi game, but as per her information he went to the house of some other lady with whom he was having illicit relations and on this the accused/appellant started beating her by saying that she is doubting his character, thereafter closed the door of house, poured the kerosene oil on her body, which was lying in the house, and set her on fire by saying that he will kill her, on which she started crying. Thereafter, same Head Constable recorded the dying declaration (Ex.P-12) of Sukhwantin Bai in which she corroborated her statement of Dehati Nalishi, the witnesses namely Ashwani Kumar & Bhuwan Lal have signed that dying declaration apart from Dr. Magloorkar and deceased Sukhwantin Bai also put her thumb impression. Dr. S.B. Magloorkar (PW-20) has stated in his evidence that on 17.2.1997 Sukhwantin Bai was brought to the Primary Health Centre, Dharsiva in a burnt condition on which he gave intimation to the Station House Officer, Police

Station Dharsiva vide Ex.P-24. He examined Sukhwantin Bai and saw that there were burn wounds on the body, face, stomach and both the hands. Upper part of thigh was also burnt and there was swelling on both the hands, even the hairs of head were also burnt and smell of kerosene oil was emanating from her body. She was in conscious condition but her body was burnt up to 60%, therefore, he gave advice to take her to Medical Hospital, Raipur and accordingly, he gave the report Ex.P-25. In the cross-examination he has stated that dying declaration was recorded in his presence. Thereafter, on 19.2.1997 Naib Tehsildar cum Executive Magistrate Ms. Yamini Pandey (PW-19) also recorded dying declaration of Sukhwantin Bai second time. Ms. Yamini Pandey (PW-19) has stated in his evidence that on 19.2.1997 at about 2.10. p.m. she went to Maikahara, Raipur and recorded the dying declaration of Sukhwantin Bai (Ex.P-22) in which Sukhwantin Bai had stated that in the Saturday evening at about 5.00 p.m. her husband poured the kerosene on her body and set her on fire by saying that she is doubting his character. This witness has further stated that she inquired from Sukhwantin Bai that who else are residing in the house, she replied that she along with her husband and five years old daughter are residing in the house. As there was swelling on the thumb and hands of the deceased, therefore, she was not able to put her thumb impression. This witness has further stated that she obtained the certificate (Ex.P-23) from the doctor regarding fitness of mind of deceased to give evidence and perusal of Ex.P-23 shows that on that the doctor gave the certificate that patient can give the statement. In the cross-examination of this witness counsel for the defence could not elicit anything from this witness which makes the dying declaration doubtful.

11. Therefore, from the above evidence of Yamini Pandey, Naib Tehsildar cum Executive Magistrate (PW-19) & Head Constable Laxmi Prasad Dubey (PW-16), who recorded the

Dehati Nalishi & dying declaration of Sukhwantin Bai, it is clear that Sukhwantin Bai made dying declaration when she was in a fit state of mind & conscious to give statement. She gave the statement voluntarily and there is nothing on record or in the cross-examination of these witnesses which goes to show that Sukhwantin Bai gave the statement in order to falsely implicate her husband or that she gave the statement on account of tutoring. Even in the cross-examination the defence has not been able to elicit anything which shows that Sukhwantin Bai gave the dying declaration on account of any animosity or concoction, rather Sukhwantin Bai has stated that after some time when she was burning the accused/appellant tried to save her. In the statement under Section 313 of the Cr.P.C. the accused/appellant has stated that he was not at the residence, but in view of the above dying declaration made by Sukhwantin Bai this defence of accused/appellant cannot be believed. Therefore, we are of the considered opinion that dying declaration made by Sukhwantin Bai was voluntary, true and same was made in a fit state of mind, as such the conviction can be based on such a dying declaration, moreover, three statements made by Sukhwantin Bai first in Dehati Nalishi, second before Head Constable Laxmi Prasad Dubey (PW-16) & third before Executive Magistrate Ms Yamini Pandey (Pw-19) on 19.2.1997 are similar with each other, there is no inconsistency in the above statements, as such conviction can be based on these statements without any corroboration. Therefore, we are of the considered opinion that the trial Court has rightly held the accused/appellant guilty for commission of heinous act as also the involvement of accused/appellant that he is the person who poured the kerosene oil on the body of deceased Sukhwantin Bai and set her on fire.

12. Now coming to the second limb of arguments of learned counsel for the accused/appellant that accused/appellant had not set the deceased Sukhwantin

Bai on fire with an intention to commit her murder. After perusal of dying declaration, we do not find any substance in this argument, for the reason that when Sukhwantin Bai inquired from the accused/appellant that during whole night where he was, he started beating her and after closing the door of house poured the kerosene oil on her body and set her on fire by saying that she is doubting his character therefore, he will finish her. The above fact shows that accused/appellant set the deceased on fire with an intention to cause her death and that is why he first closed the door, thereafter poured kerosene oil and set her on fire by saying that he will finish her. As such, on facts the judgment cited by learned counsel for accused/appellant is of no help to the accused/appellant. The facts of that case were that when the accused/appellant could not recover Rs.50,000/- advanced to the deceased some quarrel took place between the two and all of a sudden in a heat of moment the accused/appellant pick-up the wick stove, which was lying on the place of occurrence, and threw it towards the deceased, whereas, in the present case the accused/appellant firstly closed the door of house, thereafter poured the kerosene and set the deceased on fire.

13. In the result, there is no substance in this appeal. We concur with the finding of the trial Court. The appeal fails and same is dismissed.

Sd/-
L.C. Bhadoo
Judge

Sd/-
Dilip Raosaheb
Deshmukh
Judge

Roshan/-